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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: : Chapter 11
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RANDALL'S ISLAND FAMILY GOLF : Case Nos. 00 B 41065 (SMB)
:
CENTERS, INC., et al., : through 00 B 41196 (SMB)
:
Debtors. : (Jointly Administered)
:
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MEMORANDUM OF LAW IN OPPOSITION TO
MOTION OF COMMERCIAL REFRIGERATION, INC.
FOR AN ORDER GRANTING RELIEF FROM THE
AUTOMATIC STAY

The above-captioned debtors and debtors-in-possession
(collectively, the "Debtors"), respectfully submit this
Memorandum of Law in opposition to the motion (the "Motion") of
Commercial Refrigeration, Inc. ("Commercial") seeking relief from
the automatic stay in order to (i) file a mechanic's lien against
the leasehold interest of Sports Plus New Rochelle, Inc. ("Sports
Plus"), one of the above captioned Debtors, in property located
in New Rochelle, New York, (ii) foreclose on such lien and (iii)
exercise Commercial's rights to certain equipment.

INTRODUCTION

Commercial is seeking to file a notice of mechanic's lien even though its statutory time to do so has expired. Although Commercial asserts that the commencement of these cases tolled the time to file the notice of lien, there is no legal basis for that assertion.

First, the automatic stay provision of the Bankruptcy Code does not prevent the filing of a notice of mechanic's lien. As such, Commercial cannot assert that the automatic stay tolls the time to file the notice of lien. Moreover, the only provision of the Bankruptcy Code that tolls the time for bringing an action against a debtor is section 108(c). That section, however, only tolls civil actions commenced in courts other than the bankruptcy court. Since a notice of mechanic's lien is filed in the county clerk's office and not in a court, neither section 108(c) nor any other provision of the Bankruptcy Code tolls the time for filing such notice of lien.

FACTS

The Debtors rely upon the facts set forth in their Objection to Commercial's Motion, dated September 5, 2000 (the "Objection"), and incorporate the facts and arguments contained in their Objection as if set forth herein. Nevertheless, for the sake of clarity, the Debtors summarize below the most pertinent of these facts.

On December 17, 1998, Family Golf Centers, Inc. ("Family Golf"), one of the above-captioned Debtors, entered into a "Sale of Goods Agreement" (the "Agreement") with Commercial. The Agreement called for Commercial to sell and install an ice arena refrigeration system (the "Equipment") at the Sports Plus facility.

The installation of the Equipment was completed in the middle of January 2000. On May 4, 2000, each of the Debtors filed a petition for relief under chapter 11 of the Bankruptcy Code. On or about August 11, 2000, Commercial initially filed its Motion seeking relief from the automatic stay. Because Commercial failed to properly serve its Motion, on or about September 1, 2000, Commercial was required to re-file its Motion.

On September 5, 2000, the Debtors filed their Objection to the Motion. A hearing concerning the Motion was held on September 28, 2000. At that hearing, the Court requested that each party submit a memorandum of law addressing whether the filing of bankruptcy petitions by the Debtors tolled the time for Commercial to file its notice of mechanic's lien. Additionally,

so as to provide the Court with ample time to consider and resolve this matter, the Debtors agreed that the time for filing a notice of mechanic's lien would be tolled as of the date of the hearing.

ARGUMENT

The Bankruptcy Code Does Not Toll the Time To File A Notice Of Mechanics Lien

A. The New York Lien Law

The New York Lien Law provides that a creditor seeking to avail itself of the protections of a mechanic's lien has eight months from the time such creditor completes work to file a notice of mechanic's lien. Specifically, section 10 of the New York Lien Law provides:

Notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished . . .

New York Lien Law § 10 (emphasis added). Furthermore, section 10 provides that the "notice of lien must be filed in the clerk's office of the county where the property is situated." Id.

B. A notice of mechanic's lien may be filed notwithstanding the automatic stay

Section 362 of the Bankruptcy Code provides that certain actions against a debtor are stayed. Specifically, it provides that the filing of a petition for relief under the Bankruptcy Code stays, among other things, "any act to create, perfect, or

enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4). Section 362(b)(3) of the Bankruptcy Code provides an exception to that rule. It provides that "the filing of a petition . . . does not operate as a stay . . . of any act to perfect . . . an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title" 11 U.S.C. § 362(b)(3). Thus, under section 362(b)(3), as long as the act being taken - such as filing the notice of lien - is not subject to avoidance under section 546(b) of the Bankruptcy Code, the automatic stay does not prohibit that act from being taken.

Section 546(b)(1)(A) of the Bankruptcy Code states, in pertinent part:

the rights and powers of the trustee under section 544, 545, or 549 of this title are subject to any generally applicable law that-

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection;...

11 U.S.C. §546(b)(1)(A). The legislative history to section 546(b) explains that "[t]he purpose of the subsection is to protect, in spite of the surprise intervention of bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection." In re Fiorillo & Co., 19 B.R. 21, 23 (Bankr. S.D.N.Y. 1982) (quoting H.R. No 95-595, 95th Cong. 1st Sess. (1977) 371; S.R. No. 95-989, 95th Cong. 2d Sess.

(1978) 86, U.S. Code. Cong. & Admin. News 1978, p 5787, 6327.)

Section 546(b)(1)(A) thus protects a right created under state law that relates back to a prepetition period - such as the right to file a mechanic's lien.¹

Furthermore, section 545 grants the trustee the power to avoid certain statutory liens, and states:

The Trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien-

* * *

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 545

Thus, by operation of sections 362(b)(3), 546(b)(1)(A) and 545 of the Bankruptcy Code -- and as a mechanic's lien is a statutory lien that relates back to prior to the commencement of these cases and is not avoidable -- numerous courts have concluded that the filing of a notice of mechanic's lien is excepted from the automatic stay. See Armstrong World Indus., Inc. V. James A. Phillips, Inc. (In re James A. Phillips, Inc.),

¹ A mechanic's lien filed under New York Lien Law relates back to the day that work was completed. Lopriore v. Imperia Bros., Inc. (In re Lopriore), 115 B.R. 462 (Bankr. S.D.N.Y. 1990). The mechanic's lien has priority over liens against the property that arise during this time. See In re Fiorillo, 19 B.R., at 23; In re Chesterfield Developers, Inc., 285 F.Supp. 689, 692 (S.D.N.Y. 1968).

29 B.R. 391, 393 (S.D.N.Y. 1983) (the "right to assert [mechanic's] liens under state law is not stayed by the debtor's chapter 11 petition"); In re Fiorillo & Co., 19 B.R. at 23 (holding that a creditor does not need relief from the automatic stay to file a notice of mechanic's lien); see also Klein v. Civale & Trovate, Inc. (In re Lionel Corp.), 29 F.3d 88, 93 (2d Cir. 1994) (stating that the perfection of a mechanic's lien is not barred by the operation of the automatic stay); In re PDQ Copy Ctr, Inc., 27 B.R. 123 (Bankr. S.D.N.Y. 1983) (approving the relation back of liens pursuant to §546(b)); Donoyelles Co. V. Regua Elec. Supply Co., Inc., 155 Misc. 2d 451, 588 N.Y.S.2d 753 (Sup. Ct. 1992) (stating that the automatic stay would not bar mechanic's liens from being filed against a debtor's property for pre-petition work).

For example, in Fiorillo, a contractor brought an adversary proceeding seeking relief from the automatic stay to file a notice of mechanic's lien against the debtor's property. 19 B.R. at 21. The bankruptcy court analyzed sections 362(b)(3) and 546 to determine whether the contractor needed relief from the automatic stay to file its notice of lien. The court concluded that the notice could be filed notwithstanding the automatic stay, and reasoned that:

Since the availability of the relation-back procedure under the Mechanics' Lien Law is recognized under Code § 546(b) as effective against a debtor in possession in its capacity as trustee under 11 U.S.C. § 1107(a), so as to allow mechanics lienors to perfect their liens within the

statutory . . . period, notwithstanding the intervention of a Chapter 11 petition, it follows that the plaintiff should be allowed to file its notice of lien in accordance with the state law. The automatic stay is no bar because Code § 362(b)(3) expressly exempts such filing from the conduct otherwise proscribed under Code § 362(a).

19 B.R. at 23.

As Fiorillo and the other cases cited above make clear, the automatic stay does not prevent the filing of a notice of mechanic's lien. Accordingly, Commercial should not be able to assert that the existence of the automatic stay in bankruptcy acts to toll Commercial's time to file the notice of lien.

C. Section 108(c) does not toll the
time to file a notice of mechanic's lien

As explained above, Commercial had eight months from the completion of its work to file its notice of lien in the county clerks office. Commercial failed to do so. Now, after its time to file the notice of lien has expired, Commercial has asserted that the Bankruptcy Code tolls the eight month filing period. Nothing in the Bankruptcy Code or the case law, however, provides for the tolling of the time to file a mechanic's lien.

The only provision of the Bankruptcy Code that provides for the tolling of actions against a debtor is section 108(c). That section, however, merely provides that:

if applicable non-bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of petition, then such period does not expire until the later of --

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such a claim

11 U.S.C. § 108(c) (emphasis added). Thus, section 108(c) only provides for tolling in connection with civil actions in courts other than the bankruptcy court. As a leading treatise explains, section 108(c) only applies:

to time periods within which a creditor must bring an action to enforce a lien before a lien expires. But it does not appear to apply to other types of acts against a debtor or codebtor which do not involve litigation, such as the filing of documents other than in court proceedings.

Lawrence P. King, 2 Collier on Bankruptcy § 108.04 (15th Ed.).

As noted above, under the New York Lien Law, a mechanic's lien is filed in the county clerk's office -- and not by commencing a court proceeding. As a result, section 108(c) does not toll the time to file a notice of mechanic's lien. See Miner Corp. v. Hunters Run LP (In re Hunters Run LP), 875 F.2d 1425, 1428 (9th Cir. BAP 1989) (holding that section 108(c) only tolls the enforcement of a lien, but not the filing of a lien pursuant to sections 546(b) and 362(b)(3)); In re Petroleum Piping Contractors, Inc., 211 B.R. 290, 302 (Bankr. N.D. Ind. 1997) (holding that the time to perfect a mechanic's lien under Illinois law, which is similar to New York law with respect to mechanic's liens, "is not tolled by the automatic stay");

Knopfler v. Addison Bldg. Material Co., Inc. (In re Germansen Decorating, Inc.), 149 B.R. 522, 528 (Bankr. N.D. Ill. 1993)

(holding that the period for perfecting a mechanic's lien is not tolled where the lien is perfected upon filing, relates back, and is exempted from the automatic stay).²

Aside from the plain language of section 108(c), which clearly limits its application to court actions, there is a sound policy justification for not tolling the time for filing a notice of mechanic's lien. The purpose of section 108(c) is to prevent a debtor from relying on a bankruptcy filing to prevent a party from commencing litigation and thereby causing the statute of limitations to run. See House Report No. 95-595, 95th Cong., 1st Sess. 318 (1977) quoted in Lawrence P. King, 2 Collier on Bankruptcy § 108.04 ("if a creditor is stayed from commencing or continuing an action against the debtor because of the bankruptcy case, then the creditor is permitted an additional 30 days after notice of the event by which the stay is terminated . . . "). However, as discussed above, a party seeking to file a notice of mechanic's lien may do so notwithstanding the commencement of the

² Courts distinguish between perfecting a mechanics lien and seeking to enforce the lien. Since the enforcement of a lien requires court action and is prevented by operation of the automatic stay, courts hold that section 108(c) tolls the enforcement of liens. See Morton v. National Bank of New York City (In re Morton), 866 F.2d 561 (2d Cir. 1989) (the bankruptcy court's authority under the automatic stay is limited to enjoining enforcement of statutory liens).

bankruptcy case and the application of the automatic stay. As such, since the automatic stay does not prevent the filing of a mechanic's lien, there is no reason to toll the time to file any such lien.

Conclusion

As more than eight month have elapsed since Commercial completed its work on the Debtors' property, Commercial is no longer permitted to file a notice of mechanic's lien. While Commercial asserts that its time to file a mechanic's lien was tolled, there is no legal basis to support that position. On the contrary, the Bankruptcy Code and relevant case law are clear that the automatic stay did not prevent Commercial from filing its notice of mechanic's lien and that the time to file a notice of mechanic's lien is not tolled.

For all the forgoing reasons and the reasons set forth in the Debtors' Objection, the Debtors respectfully request that this Court deny Commercial's Motion.

Dated: New York, New York
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